

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS AND INTERFERENCES**

In Re Application of:

Confirmation No.: 8465

Robert O. Banker

Group Art Unit: 2425

Serial No.: 09/692,920

Examiner: Idowu, Olugbenga O.

Filed: October 20, 2000

Docket No.: 60374.0004US25/ CPOL 967904

For: Media on Demand Title Indexing System

**REPLY BRIEF UNDER 37 C.F.R. § 41.41**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

This is a Reply Brief in response to the Examiner's Answer dated November 16, 2009. The Examiner's Answer addresses various informalities of the previous Examiner's Answer (dated March 17, 2009) as set forth in the Board's request for correction of these informalities dated July 21, 2009, including removal of previously canceled claim 41 from the Grounds of Rejection, and insertion of text from the Final Office Action corresponding to the grounds of rejection that was omitted in the March 17<sup>th</sup> Examiner's Answer. The requirement to remove claim 41 for consideration in the Grounds of Rejection of Appellant's first Appeal Brief has been remedied with the filing of the Supplemental Appeal Brief on August 13, 2009.

## **I. STATUS OF THE CLAIMS**

Claims 1-5, 16-18, 21-23, 25-27, 32, 34-35, 38-40 and 42-59 remain pending in the present application. The Examiner's Answer maintains the rejections of claims 1-5, 16-18, 21-23, 25-27, 32, 34-35, 38-40 and 42-59 under 35 U.S.C. § 103(a) and generally repeats the arguments advanced in Section 3, pages 2-13 of the Final Office Action dated July 22, 2008 and the arguments presented in the Examiner's Answer dated March 17, 2009. With regard to the substantive remarks of the Examiner's Answer, Appellant respectfully disagrees. Appellant essentially repeats the arguments presented in the first Reply Brief dated May 18, 2009 (with changes made to page references due to page enumeration changes in the second Examiner's Answer when compared to the first Examiner's Answer), since Appellant treated the Appeal as though the grounds of rejection were as set forth in the Final Office Action, except with the cancellation of claim 41. Thus, as alleged in the first Reply Brief, Appellant addresses some issues raised in the Examiner's Answer, and continues to repeat, re-allege, and incorporate by reference the positions and arguments set forth in the first and supplemental Appeal Briefs.

## **II. ARGUMENTS**

Appellant addresses some of the rebuttal comments beginning on page 16 of the Examiner's Answer below. The omission of discussion pertaining to some issues raised in the Examiner's Answer should not be interpreted as an admission of the assertions made in the Examiner's Answer.

The Examiner Answer alleges on page 17 the following:

...it is clear that Rubinstein calculates an average value based on keyword occurrence then uses the value calculated as a limiting value for indexing, col. 10, lines 52-67. Hence, using a calculated average value to limit subsequent index grouping is equivalent to using a threshold or predetermined number to control and indexing process.[sic]

Appellant respectfully disagrees. Col. 10, lines 52-67 of *Rubinstein* provides as follows (emphasis added):

First, the key word and key phrase content is scanned to determine the first alphanumeric character appearing for each key word and key phrase. Next, the total number of key words and key phrases beginning with the same alphanumeric character are tallied for each alphanumeric character. The average number of key words and key phrases beginning with the same alphanumeric character is then computed. Groups of sequential alphanumeric characters are collected such that the total number of key words and key phrases beginning with the alphanumeric characters from the group approaches the average previously computed. In some cases, a single alphanumeric character may have enough key words and key phrases beginning with that alphanumeric character that the total for that alphanumeric character approaches the average previously computed.

Appellant respectfully submits that it is a mischaracterization of *Rubinstein* to ascribe the term “threshold” to the phrase “approaches the average.” Although *Rubinstein* is rather unclear as to the specifics of the mechanism involved on index creation, in view of what has been disclosed in *Rubinstein*, one having ordinary skill in the art would expect that “approaching an average,” for instance, may exceed the average in some instances and still remain operational – quite contrary to the everyday meaning of the term “threshold,” which normally represents an on/off type of operation (e.g., valid below, invalid above). Indeed, in view of the computation involved in *Rubinstein*, it would be reasonable for one having ordinary skill in the art to expect that some indexes will exceed the average, especially since you can approach an “average” from two directions (e.g., from a positive and negative direction). For instance, referring to Figure 5 of *Rubinstein*, if during computation it is discovered that the “F” index was equal to the average, the “G” index slightly exceeded the average, and “H” was equal to the average, how would one expect the index “G” to be split up with the “F” or “H” indexes? That is, one queries in this example how the claimed sequence could be maintained if the “average” was indeed a “threshold?” Indeed, the consistent use of the phrase “approaches the average” in *Rubinstein* would appear to convey a clear understanding by the *Rubinstein* inventors that there likely needs to be latitude in the number of keywords and phrases for each index surrounding the

average. This is a reasonable observation especially since the application to which *Rubinstein* is involved (searching various documents on the web or in locally residing files) is likely a more dynamic environment (and hence less predictable for purposes of having a predetermined threshold value), than a search in a subscriber network of available media titles. To the extent *Rubinstein* is relied upon for allegedly supporting these claim features, Appellant respectfully submits that *Rubinstein* fails in this regard and accordingly, Appellant respectfully requests that the rejection be overturned.

### **III. CONCLUSION**

Based upon the foregoing discussion, the Appellants respectfully request that the Examiner's final rejection of claims 1-5, 16-18, 21-23, 25-27, 32, 34-35, 38-40 and 42-59 be overruled and withdrawn by the Board, and that the application be allowed to issue as a patent with all pending claims.

No additional fee is believed to be due. However, any additional fee that may be due or required is authorized to be charged to deposit account no. 13-2725.

Respectfully submitted,

Date: December 14, 2009

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